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No. 588

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**In the Supreme Court of the United States**

**OCTOBER TERM, 1941**

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**NATIONAL LABOR RELATIONS BOARD, PETITIONER**

**v.**

**ELECTRIC VACUUM CLEANER COMPANY, INC.;  
INTERNATIONAL MOLDERS' UNION OF NORTH  
AMERICA, LOCAL 430; PATTERN MAKERS' ASSO-  
CIATION OF CLEVELAND AND VICINITY; INTERNA-  
TIONAL ASSOCIATION OF MACHINISTS, DISTRICT NO.  
54; METAL POLISHERS' INTERNATIONAL UNION,  
LOCAL NO. 3; AND FEDERAL LABOR UNION NO.  
18,907**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH  
CIRCUIT**

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED  
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The Solicitor General, on behalf of the National Labor Relations Board, prays that a writ of certiorari issue to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on June 6, 1941 (R. 866), setting aside and refusing to enforce an order issued by the Board against Electric Vacuum Cleaner Company, Inc. (R. 211-215).

**OPINIONS BELOW**

The opinion of the Circuit Court of Appeals (R. 867-875) is reported in 120 F. (2d) 611. The findings of fact, conclusions of law, and order of the Board (R. 150-217) are reported in 18 N. L. R. B. 591.

**JURISDICTION**

The decree of the Circuit Court of Appeals was entered on June 6, 1941 (R. 866). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

**STATUTE INVOLVED**

The pertinent provisions of the National Labor Relations Act are set forth in the Appendix.

**QUESTIONS PRESENTED**

The respondent in 1935 and 1936 made one year written contracts with a labor union accompanied by an oral and never disclosed understanding that employees subsequently hired would be required to join that union. Respondent in 1937, shortly prior to the expiration of the 1936 contract, sought by coercive and discriminatory acts to force employees not covered by the oral agreement into the union, and to prevent them from joining a rival union. After a shut-down designed to aid the first union, respondent reopened under a full

closed-shop agreement with it. The questions are:

1. Whether the respondent by virtue of its 1935 and 1936 agreements with the union as to the membership of new employees was protected by the proviso of section 8 (3) of the Act in compelling the union membership of old employees.

2. Whether the oral and secret understanding with the union at the time the 1935 and 1936 contracts were signed was sufficient to invoke the protection of the proviso of section 8 (3) even as to the new employees.

3. Whether the 1935 and 1936 agreements, read in the light of revocable membership applications signed by the union members, implied an undertaking by those employees not to change their union affiliation during the life of the 1935 and 1936 agreements.

4. Whether, assuming there was such an undertaking, the respondent by coercion and discrimination may discourage the employees from advocating toward the close of the contract period a change in union affiliation.

5. Whether the favored union had been maintained and assisted by the respondent, prior to the 1937 closed-shop agreement, so that this agreement is not entitled to the protection of the proviso of section 8 (3) of the Act.

#### STATEMENT

Upon the usual proceedings, the Board issued its findings of fact, conclusions of law, and order

(R. 150-217). Omitting jurisdictional findings, the facts, as found by the Board and as shown by the evidence, may be summarized as follows:<sup>1</sup>

On June 22, 1935, the Company entered into a written contract with five unions affiliated with the American Federation of Labor;<sup>2</sup> the contract covered terms and conditions of employment and granted exclusive recognition to the A. F. of L. Affiliates for a period of one year (R. 160; Bd. Exh. 6, 845-848, 237-238, 810-811). Before signing the contract the Company was presented with membership authorizations by the A. F. of L. Affiliates, signed by 608 out of a total of 799 employees (R. 160; A. F. of L. Exh. 2, 865, 253). Although the A. F. of L. Affiliates had requested a closed shop, the Company refused to grant the request. The parties orally agreed, however, that all new employees, those hired after the date of the contract,<sup>3</sup> should be required to join the appropriate A. F. of L. affiliate after a work-proba-

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<sup>1</sup> In the following statement, the references preceding the semicolons are to the Board's findings and the succeeding references are to the supporting evidence.

<sup>2</sup> International Molders' Union of North America, Local 430; Pattern Makers' Association of Cleveland and Vicinity; International Association of Machinists, District No. 54; Metal Polishers' International Union, Local No. 3; and Federal Labor Union No. 18907.

<sup>3</sup> We refer, as does the Board's decision, to those in the Company's employ on June 22, 1935, when the contract was entered into, as "old" employees, and to the persons hired thereafter as "new" employees.

tion period of two weeks. (R. 160; 264-265, 811, 750, 741-742.) The oral agreement was never put in writing and its existence was never revealed to the employees (R. 164-166; 741-742, 750-751, 688, 811). The Board found specifically that the oral agreement applied only to new employees and that it did not require the old employees who had joined the A. F. of L. Affiliates to maintain their union membership as a condition of employment (R. 161-163).

On July 6, 1936, these written and oral agreements were extended to June 23, 1937; but again the employees were not informed of the oral agreement requiring new employees to join the A. F. of L. Affiliates (R. 161; Bd. Exh. 7, 238, 849-851, 264-265, 812, 686, 741-742, 689-690). The A. F. of L. Affiliates at this time represented all but 38 of the workers (R. 161; 253).

In March 1937, about 3 months prior to the terminal date of the contracts renewed in 1936, a number of the Company's employees took steps to organize a local union to be affiliated with the United Electrical and Radio Workers of America, which, in turn, was an affiliate of the C. I. O. (R. 170, 177; 379-381, 429-430). On March 17 about 60 employees had signed up with the United (R. 180; 429-430).

The Company and the A. F. of L. Affiliates immediately took joint action to compel the employees to join the A. F. of L. Affiliates and keep

them from joining the C. I. O. On March 16, 17, and 18, 1937, groups of men, most, if not all, of whom were old employees, were sent to the offices of company executives and, in the presence of ranking A. F. of L. officials, were ordered to join the A. F. of L. Affiliates. R. B. Wilson, the executive vice president of the Company, and George H. Paulus, the plant superintendent, were among those who engaged in these coercive measures. (R. 166-178; 305-308, 510, 513-518, 685, 526-529, 691, 268.) A number of the employees signed applications in the executive's offices for membership in the A. F. of L. Affiliates (R. 177-178; 308, 699). One old employee named Ramsey refused, however, to sign such an application and was discharged forthwith (R. 172-177; 525-529, 691, 268). Ramsey's discharge caused a one-day sit-down strike in the machine shop, which was amicably settled when the Company and the A. F. of L. Affiliates agreed to Ramsey's reinstatement and agreed that the employees should have the right to join a union of their own choosing (R. 180-185; 383-385, 267-268, 281-282, 431-438, Bd. Exh. 19, R. 857, 268).

The strike ended on Friday, March 19; the employees expected to return to work on Monday, March 22 (R. 184; 437-438, 484, 496). Vice-President Wilson testified that that was also the Company's intention when the strikers left the plant (R. 279-280). On Saturday, March 20, however,

the Company inserted notices in the local newspapers, stating that the plant would be closed on Monday and that the shutdown was at the request of the A. F. of L. Affiliates (R. 185-187; Bd. Exh. 15, R. 856). Wilson testified that the A. F. of L. Affiliates demanded that the plant be closed so that "they might go over the situation and get their lines in order" in order to defeat the C. I. O. attempt "to proselyte members" among the employees (R. 255-256, 273).

On March 28 a meeting of the United was held, attended by about 500 employees, for the purpose of securing formal resignations from the A. F. of L. Affiliates (R. 189; 389-391, 399-401, 611, 617-618, 340-341). On April 2, the United mailed a letter to the company stating that a majority of the employees had resigned from the A. F. of L. Affiliates and had joined the United (R. 189; Bd. Ex. 11, R. 240-241).

The shut-down lasted for two weeks; the plant reopened on Monday, April 5. On the preceding Saturday and Sunday, the Company inserted notices in the local newspapers, stating that under its 1936 contract it was required to "employ only persons affiliated with" the A. F. of L. Affiliates; the notices announced the reopening of the plant and concluded with a statement that only those employees who were members of the A. F. of L. Affiliates would be employed (R. 189, 192-194; Bd. Exh. 8, R. 852). The Board found that these notices misrepresented the terms of the 1936 con-

tracts and were deliberately intended to conceal the recent origin of a new closed-shop agreement which the Company and the A. F. of L. Affiliates had arrived at in discussions on April 3, 1937, relative to reopening the plant (R. 193; 253-256, 726, 813).

The Board found that (1) by discharging Ramsey, (2) by forcing old employees to join the A. F. of L. Affiliates, and (3) by the lock-out, the Company had interfered with, restrained, and coerced its employees in the exercise of rights guaranteed by Section 7 of the Act, and had thereby violated Section 8 (1) of the Act (R. 177-178, 187-188). It also found that the A. F. of L. Affiliates were the beneficiaries of these unfair labor practices (R. 196); hence that on April 3, 1937, they were precluded from making a closed-shop contract by the proviso in Section 8 (3) of the statute, which declares that such a contract may not be made with a labor organization "assisted by any . . . unfair labor practice" (R. 194-195).

Conformably to the closed-shop agreement of April 3, 1937, the Company refused to permit any employee to return to work who did not present a clearance card from the A. F. of L. Affiliates (R. 190; C. I. O. Exh. 1, R. 864, 276-277, 252, 368, 332-333, 342, 353, 479, 726, 813).

Twenty-four members of the C. I. O., of whom 19 were old employees<sup>4</sup> and 5 were new, were victims of the Company's discriminatory reinstatement policy (R. 197-200).<sup>5</sup> The Board concluded that the failure to reinstate these employees was in violation of Section 8 (3) and (1) of the Act (R. 197-200). In so finding, the Board noted that the April 3, 1937, closed-shop contract, because of its invalidity, afforded no justification for the discrimination against these employees (R. 197). With respect to the 5 new employees, the Board noted that the secret 1936 oral agreement requiring new employees to become members of the A. F. of L. Affiliates (*supra*, p. 5) had in effect been abandoned on April 3, 1937, when the parties agreed upon the more comprehensive closed-shop agreement (R. 193-194, 199). It therefore concluded that the 1936 oral contract could not justify the discrimination against the new men. Independently of this, the Board held that the

<sup>4</sup> Three of the 19 had never been a member of the A. F. of L. Affiliates (R. 197, note 43; 455-456, 482-483, 372-374).

<sup>5</sup> Some were refused clearance by the A. F. of L. Affiliates (R. 300, 310-312, 323, 325, 328-329, 347, 349-350, 462, 464-467, 559, 560-561, 570-571, 584-585, 586, 587-588, 600, 601-602, 605, 610, 613, 617, 618-619, 630, 631-632, 635, 636-637); others made persistent attempts to get clearance cards, but after being shunted from one A. F. of L. representative to another, abandoned further efforts (R. 337, 340-343, 364, 365-369, 482, 485-487, 621, 622, 627-628); a few got clearance cards after persistent attempts, only to be denied employment on the ground that their jobs had in the meanwhile been filled (R. 447, 448, 449-452, 455, 458-461, 553-554, 555-557).

Company's failure to notify the employees of the existence of the agreement deprived it of the right which it might otherwise have had to insist that new employees become members of the A. F. of L. Affiliates as a condition of reinstatement (R. 179, 199-200).

On May 20, 1937, the oral closed-shop agreement of April 3, 1937, was superseded by a written contract, requiring all employees to be members of the A. F. of L. Affiliates, irrespective of when they had entered the Company's employ (R. 196; Bd. Exh. 10, R. 853, 41-43, 39). The Board found that this agreement was invalid for the same reasons that the April 3 contract was unlawful (R. 200).

Upon these findings, the Board ordered the Company to cease and desist from the unfair labor practices found; to cease giving effect to the closed-shop clause of its contract with the A. F. of L. Affiliates, dated May 20, 1937; and to cease giving effect to any provision of that contract if and when the Board should certify another labor organization as the exclusive bargaining representative of its employees (R. 211-213). As affirmative action, the Board ordered the Company to offer reinstatement with back pay to 22 of the 24 employees discriminated against,\* and to post appropriate notices (R. 213-217).

\* The other 2 victims of discrimination had been reinstated prior to the hearing (p. 208).

Thereafter the Board petitioned the court below for enforcement of its order (R. 1-9). A motion of the A. F. of L. Affiliates (other than Pattern Makers' Association of Cleveland and Vicinity) to intervene was granted (R. 44-45). On June 6, 1941, the court below handed down its opinion and entered a decree setting aside the Board's order in its entirety and dismissing the petition for enforcement (R. 866).

#### REASONS FOR GRANTING THE WRIT

The court below recognized that the respondent had assisted the A. F. of L. Affiliates from March to May 1937, and that this assistance would normally be illegal (R. 869-870). It nevertheless held that the assistance was "justified by respondent's efforts to maintain the valid contract of 1936" (R. 872). Accordingly, the court held that the closed-shop contracts of April 3 and May 20, 1937, were authorized by the proviso of section 8 (3) and that respondent had committed no unfair labor practice (R. 874).

1. The 1935 and 1936 contracts between respondent and the A. F. of L. Affiliates were not closed-shop contracts; as written they contained no provision requiring membership in the A. F. of L. Affiliates. The oral understanding was only that new employees would be required to join, and neither new nor old employees were given notice of this understanding (*supra*, pp. 4-5). Plainly, the Act does not contemplate that the employer

can justify discriminatory conduct on the ground of an agreement never disclosed to his employees. But even assuming there had been no secrecy, the 1935 and 1936 contracts did not cover the old employees. Section 8 (3), therefore, does not authorize discrimination against them because of their failure to join the A. F. of L. Affiliates. See *National Labor Relations Board v. Waterman S. S. Co.*, 309 U. S. 206, 213; *South Atlantic S. S. Co. v. National Labor Relations Board*, 116 F. (2d) 480 (C. C. A. 5), certiorari denied, No. 969, October Term, 1940. This branch of its decision raises questions of large importance which should be settled.

The respondent actively coerced old employees, not covered by the contract, into joining the A. F. of L. Affiliates; when the rival United threatened the position of the A. F. of L. Affiliates, the employer shut down the plant and negotiated a full closed-shop contract before reopening (*supra*, pp. 5-8). The court below justified this conduct under the proviso of section 8 (3). It said that "the proviso was enacted to give the employer the opportunity of dealing in an orderly fashion with one organization only, instead of with various conflicting organizations" (R. 872). Neither the terms of the proviso nor its history justify such a conclu-

<sup>1</sup> The Senate Committee (S. Rpt. No. 573, 74th Cong., 1st Sess., pp. 11-12) said:

"The reason for the insertion of the proviso is as follows:

"According to some interpretations, the provision of section 7 (a) of the National Industrial Recovery Act, assur-

sion. The proviso was designed simply to ensure that section 8 (3) did not make the closed-shop contract illegal. It permits the union and the employer to make union membership a condition of employment, but does not remove the employer from the command of section 8 (1), that in other respects he neither interfere with nor coerce his employees in the exercise of their right to join a labor organization of their own choosing.

The oral contract of April 3 and the written contract of May 20, 1937, were full closed-shop agreements. But the respondent and the A. F. of L. Affiliates were at those dates disqualified from entering into such a contract. Section 8 (3) authorizes an agreement, requiring union membership as a condition of employment, "with a labor organization (not \* \* \* assisted by any \* \* \* unfair labor practice)." The A. F. of L. Affiliates, as the court below recognized (R. 869, 872), prior to the 1937 contracts had been assisted by conduct which would be an unfair labor

ing the freedom of employees 'to organize and bargain collectively through representatives of their own choosing,' was deemed to illegalize the closed shop. The committee feels that this was not the intent of Congress when it wrote section 7 (a); that it is not the intent of Congress today; and that it is not desirable to interfere in this drastic way with the laws of the several States on this subject."

The Report went on to emphasize, however, that:

"\* \* \* the bill is extremely careful to forestall the making of closed-shop agreements with organizations that have been 'established, maintained, or assisted' by any action defined in the bill as an unfair labor practice \* \* \*"

practice were it not for the proviso in section 8 (3). But that proviso by its terms excludes from its protection a closed-shop contract with an assisted organization. The decision below, which disregards the employer assistance prior to the closed-shop contract, departs from the decisions of this and other courts. *I. A. of M. v. National Labor Relations Board*, 311 U. S. 72, 81; *Hamilton-Brown Shoe Co. v. National Labor Relations Board*, 104 F. (2d) 49, 54 (C. C. A. 8); *National Labor Relations Board v. National Motor Bearing Co.*, 105 F. (2d) 652, 659-660 (C. C. A. 9); *National Labor Relations Board v. J. Greenebaum Tanning Co.*, 110 F. (2d) 984, 987 (C. C. A. 7).

2. The court below, without regard to section 8 (3) and because of the revocable membership applications signed by the union members, held that it was "an implied term" of the 1936 contract that the members of the A. F. of L. Affiliates agreed during the life of the contract not to "discard membership in one union for membership in another," and that they "violated the contract when they tried to bring in a rival union, and became rightfully subject to discharge" (R. 873). There is no evidence whatever to support any finding of an express undertaking of this nature, and the finding of the Board (R. 178) is to the contrary; the court below, therefore, of necessity views such an undertaking as inherent in any

exclusive union contract. This branch of its decision similarly raises a question of importance in the administration of the Act.

Any rule such as that laid down below would gravely limit the employees' freedom to choose their representatives. Once a contract were made, the choice of representatives might often become irrevocable, since the employer could rightfully discharge any employee who advocated a change in representation. The freedom and the rights of labor require, particularly as the life of the contract draws to a close, that the employees be able to advocate a change in their affiliation without fear of discharge by an employer for so doing.

#### CONCLUSION

For these reasons, we respectfully submit that this petition for a writ of certiorari should be granted.

CHARLES FAHY,  
*Acting Solicitor General.*

ROBERT B. WATTS,  
*General Counsel,*  
*National Labor Relations Board.*

SEPTEMBER 1941.

## APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449; 29 U. S. C., Supp. V, Sec. 151 *et seq.*) are as follows:

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

\* \* \* \*

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in

this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.